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Thomson SA***

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION,

No. 07-cv-5944-SC
MDL No. 1917

This Document Relates to:

*Electrograph Systems, Inc. et al. v.
Technicolor SA, et al., No. 13-cv-05724;*

*Alfred H. Siegel, as Trustee of the Circuit
City Stores, Inc. Liquidating Trust v.
Technicolor SA, et al., No. 13-cv-00141;*

*Best Buy Co., Inc., et al. v. Technicolor SA,
et al., No. 13-cv-05264;*

**THOMSON SA'S REPLY IN SUPPORT
OF ITS MOTION TO DISMISS NEWLY
FILED DIRECT ACTION PLAINTIFFS'
COMPLAINTS**

Date: March 7, 2014
Time: 10:00 a.m.
Place: Courtroom 1, 17th Floor
Judge: Hon. Samuel Conti

1 *Interbond Corporation of America v.*
2 *Technicolor SA, et al., No. 13-cv-05727;*

3 *Office Depot, Inc. v. Technicolor SA, et al.,*
4 *No. 13-cv-05726;*

5 *Costco Wholesale Corporation v.*
6 *Technicolor SA, et al., No. 13-cv-05723;*

7 *P.C. Richard & Son Long Island*
8 *Corporation, et al. v. Technicolor SA, et al.,*
9 *No. 31:cv-05725;*

10 *Schultze Agency Services, LLC, o/b/o*
11 *Tweeter Opco, LLC, et al. v. Technicolor SA,*
12 *Ltd., et al., No. 13-cv-05668;*

13 *Sears, Roebuck and Co. and Kmart Corp. v.*
14 *Technicolor SA, No. 3:13-cv-05262;*

15 *Target Corp. v. Technicolor SA, et al., No.*
16 *13-cv-05686*

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INTRODUCTION

Thomson SA is not subject to the personal jurisdiction of this Court. Thomson SA is a French holding company that never manufactured or sold CRTs or CRT Products in the United States. Even with complete access to the extensive record that has been developed after years of fulsome discovery in this case, the DAPs do not present any evidence in their Opposition that establishes Thomson SA took any intentional acts expressly aimed at causing the DAPs antitrust injury in the United States. The DAPs' claims also fail because they are untimely. The Court has already found, and thus it is undisputed, that the DAPs unreasonably delayed filing their claims and that Thomson SA would be prejudiced if it was forced to join this litigation now. (*See* Sept. 26, 2013 Order at 4-6 [Dkt. No. 1959].) Accordingly, the DAPs' reliance on tolling doctrines is barred by laches. Moreover, none of the tolling doctrines asserted by the DAPs save their tardy claims. Consistent with the Court's September 26, 2013 Order, the DAPs' newly-filed Complaints against Thomson SA should be dismissed with prejudice.

ARGUMENT

I. THE DAPS' CLAIMS AGAINST THOMSON SA SHOULD BE DISMISSED BECAUSE THIS COURT LACKS PERSONAL JURISDICTION OVER IT.

A. The DAPs Concede That the Court Does Not Have General Jurisdiction Over Thomson SA and They Have Failed to Make a Prima Facie Case That Thomson SA Is Subject to Specific Jurisdiction.

General jurisdiction exists over foreign corporations like Thomson SA only when their "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *See Daimler AG v. Bauman*, 134 S. Ct. 746, 760-61 (2014) (quoting *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851 (2011)). The DAPs do not address general jurisdiction in their Opposition and therefore have waived any argument that Thomson SA is subject to the general jurisdiction of this Court. *See In re Memory Interactive Sec. Litig.*, 618 F.3d 688, 992 (9th Cir. 2010).

The DAPs have also failed to establish Thomson SA is subject to specific jurisdiction. To establish specific jurisdiction over Thomson SA, the DAPs must show that: (1) Thomson SA

purposefully directed activities at this forum; (2) the DAPs' claims against it arise out of or result from Thomson SA's forum related activities; and (3) the exercise of jurisdiction is reasonable. *See Bancroft & Masters v. Augusta Nat'l Inc.*, 223 F.3d 1080, 1086-7 (9th Cir. 2000). The DAPs have not, and cannot, satisfy these elements.

1. The DAPs Have Failed to Plead Facts Establishing That They Have Been Harmed by Actions Thomson SA Purposefully Directed at the United States.

In its now withdrawn December 11, 2013 Order, the Court found that Sharp had failed to establish a prima facie case that Thomson SA was subject to specific jurisdiction. (Dec. 11, 2013 Order [Dkt. No. 2252] at 12-15.) The Court stated that "[o]n Plaintiffs' allegations and evidence, the Court cannot find that [Thomson SA] engaged in any intentional acts directed at the United States." (*Id.* at 14-15.) "Plaintiffs' evidence, which often references 'Thomson' generally is . . . inconclusive. Under these circumstances, the Court cannot find that [Thomson SA] intentionally aimed any action toward the United States, that [Thomson SA's] actions were the but-for cause of Plaintiffs' claims, and especially that exercising jurisdiction would be reasonable." (*Id.* at 15.)

The DAPs' Opposition does not warrant a different finding here. Citing to similar, and in many cases identical, documents as those previously cited by Sharp – evidence this Court previously found "inconclusive" – the DAPs argue that Thomson SA participated in an alleged global conspiracy to fix the price of CRTs. They assert that Thomson SA must have purposely directed anticompetitive activity at the United States because representatives of some generic, unidentified "Thomson" entity attended foreign meetings with other defendants where information concerning pricing and production information related to CRTs and CRT Products sold in the United States was allegedly discussed. (Opp'n. at 4-8.) The DAPs also make conclusory statements that their federal and state claims would not have arisen absent this alleged global price fixing conspiracy, and Thomson SA's alleged participation in it, such that Thomson SA's conduct is a but-for cause of the antitrust injuries the DAPs' allegedly suffered in the United States. (*Id.* at 9.)

1 The DAPs' attenuated arguments and evidence do not establish a prima facie case that
2 Thomson SA committed intentional acts directly aimed at the United States that were a but-for
3 cause of their alleged domestic antitrust injuries. The exhibits the DAPs attach to their brief do
4 not: (1) establish that Thomson SA set the prices at which its United States subsidiary, Thomson
5 Consumer, sold CRTs in the United States; and (2) refute the statements in the Cadieux, O'Hara,
6 and Debon Declarations establishing that Thomson SA did not do so. (See Cadieux Decl. at ¶¶
7 14-15, attached as **Ex. 3** to Thomson SA's Mot.; O'Hara Declaration at ¶¶ 5-7, **Ex. 5**
8 ("Thomson [Consumer] control[ed] its day-to-day activities" and was "responsible for the sales
9 and marketing of products in the United States."); Debon Declaration at ¶ 6, **Ex. 6** ("Thomson
10 SA d[id] not direct or advise Thomson [Consumer] on how to sell or distribute any Thomson
11 [Consumer] product in the United States.")) For example, the DAPs assert that Exhibits A and
12 B attached to their Opposition establish that Thomson SA took intentional acts aimed at the
13 United States to set the prices of CRTs sold here. (Opp'n. at 3-4.) In fact, these exhibits show
14 only that:

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 • [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 The other exhibits attached to the DAPs' Opposition also fail to prove that Thomson SA
27 took intentional acts aimed at the United States in furtherance of the alleged CRT conspiracy.
28

1 Like Sharp,



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9 The other documents
10 cited by the DAPs refer to the activities of some generic, unidentified “Thomson” entity, but do
11 not establish that Thomson SA set the prices of CRTs Thomson Consumer sold in the United
12 States.¹

13 Simply stated, although over 100 depositions have been conducted in this case, nearly 5
14 million pages of documents have been produced by the parties, and the discovery cut-off is just
15 months away, the DAPs are unable to present a single document to this Court that establishes
16 Thomson SA engaged in anticompetitive activity directly aimed at causing the DAPs harm in the
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28 None of these documents
establish that Thomson SA directly aimed any activities at the United States.

United States.² The reason for this failure is simple – Thomson SA has never manufactured or sold CRTs or conducted any CRT business in the United States. The DAPs have failed to establish a prima facie case that Thomson SA is subject to this Court’s specific jurisdiction, so their Complaints should be dismissed with prejudice.

2. The DAPs Have Failed to Plead Facts Establishing That Thomson SA Was a But-For Cause of the Antitrust Injuries They Allegedly Suffered in the United States.

Because they cannot plead facts showing that Thomson SA took any intentional acts aimed at causing them antitrust injury in the United States, the DAPs are unable to make a prima facie case that Thomson SA’s forum-related conduct was a but-for cause of their claims. Instead, the DAPs assert that: (1) Thomson SA participated in the alleged global antitrust conspiracy by attending meetings in Europe with other defendants in this case (many of whom had a customer-supplier relationship with Thomson affiliated companies) and (2) its United States subsidiary, Thomson Consumer, generated substantial revenues from its CRT-related operations in this country, so *ipso facto* forum-related activities of Thomson SA were a but-for cause of the DAPs’ alleged antitrust injuries. (Opp’n. at 7-9.) This attenuated theory of but-for causation should be rejected. Where, as here, a foreign defendant has had limited contact with the forum, an especially “close nexus between its forum-related activities and the cause of the plaintiffs’ harm” is required to establish the but-for causation needed to subject a defendant to specific jurisdiction. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 n.7 (1990) (rev’d on other grounds, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)); *see also Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987). The DAPS have not plead facts or attached evidence to their Opposition that establishes a connection, let alone but-for causation, between any

² The DAPs’ argument that “in its 2011 Annual Report to shareholders Thomson SA admitted that it” participated in a global conspiracy to fix the price of CRTs is also strained and unavailing. (*See* Opp’n. at 2.) The fact that Thomson SA was one of the many targets of the European Commission’s investigation into alleged CRT price-fixing activity in Europe does not even suggest, let alone establish, that Thomson SA took any anticompetitive actions directed at the United States. The subject of the EC’s investigation – CRT sales in Europe – was not co-extensive with the subject of the DAPs’ claims here, which relate to CRTs sold in the United States.

intentional acts Thomson SA expressly aimed at this forum and the DAPs' claims. As a result, the DAPs have failed to satisfy the second element of the *Calder*-effects test, and their claims against Thomson SA should be dismissed for lack of personal jurisdiction.

3. The Exercise of Specific Jurisdiction Over Thomson SA Would Not Be Reasonable.

In these circumstances, the exercise of specific jurisdiction over Thomson SA would not be reasonable. The first factor evaluated by courts when determining if it would be reasonable to exercise specific jurisdiction over a foreign defendant – “the extent of the defendant’s purposeful interjection into the forum state” – is wholly absent here. “The smaller the element of purposeful interjection, the less is jurisdiction to be anticipated and the less reasonable is its exercise.” *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1488 (9th Cir. 1993).

Here, at all relevant times, Thomson SA was not a manufacturer – it was a holding company headquartered and incorporated in France. (*See* Cadieux Decl. at ¶¶ 14-15, **Ex. 3**.) Thomson SA has no operations, offices, employees, bank accounts, or registered agents in the United States and it owns no property, is not registered to do business, and does not pay taxes here. (*Id.* at ¶¶ 6-8, 10-13.) It did not control the day-to-day operations of Thomson Consumer in the United States nor set the prices of tubes sold by Thomson Consumer in this forum. (O’Hara Declaration at ¶¶ 5-7, **Ex. 5**; Debon Declaration at ¶ 6, **Ex. 6**.) With complete access to the voluminous discovery record in this case, the DAPs are unable to refute these facts. Because Thomson SA has not purposefully interjected itself into this forum, requiring it to litigate the DAPs’ tardy claims in a foreign jurisdiction would impose an unreasonable burden on it.

B. The Court Should Not Grant the DAPs Jurisdictional Discovery.

As noted above, the DAPs have not even attempted to argue that Thomson SA is subject to the Court’s general jurisdiction, so there is no reason that the DAPs should be permitted to conduct discovery on that topic. Despite the fact that they have had access to the enormous discovery record compiled during the last four years, including extensive document productions from Thomson SA’s alleged co-conspirators, the DAPs are still unable to plead specific facts or cite to evidence that controverts Thomson SA’s declarations showing that it is not subject to

specific jurisdiction. At this advanced stage in these proceedings, there is simply no basis to believe that by permitting the DAPs to conduct additional far-ranging jurisdictional discovery against Thomson SA they will obtain evidence that supports their attenuated theory of specific jurisdiction. Accordingly, Thomson SA respectfully requests that the Court deny the DAPs jurisdictional discovery.

II. THE NEW DAP CLAIMS AGAINST THOMSON SA SHOULD BE DISMISSED BECAUSE THEY FAIL TO PLEAD VIABLE CLAIMS.

A. The DAPs' Tardy Claims Against Thomson SA Are Barred by the Doctrine of Laches.

The DAPs' claims against Thomson SA are barred by laches. This Court has already found "[t]he DAPs had ample time to add Thomson to their complaints without delay or prejudice, but they did not" and that their delay was "not justifiable." (Sept. 26, 2013 Order at 5-6.) The DAPs do not credibly explain why they waited for over four years to assert claims against Thomson SA after it was dropped as a party from the class actions in March 2009, despite the fact that the DAPs had: (1) knowledge of the alleged conspiracy since *at least* 2007 and (2) access to the comprehensive discovery record in this case since at least 2011. Instead, they baldly assert that they have not unreasonably delayed bringing suit.³ The DAPs' assertions completely ignore the Court's previous rejection of this argument when it held that their undue delay had caused the Thomson Defendants severe prejudice. ([Dkt. No. 1959 at 4-6].) By repackaging the same tardy claims in their newly-filed Complaints and rehashing their previously rejected arguments, the DAPs are simply attempting to get the Court to reconsider its previous findings. Nothing has changed, other than more delay and more prejudice, since the Court entered its Order finding that the Thomson Defendants would be severely prejudiced if they were forced to enter this litigation to defend against the DAPs' claims now. Accordingly,

³ Any "presumption" that claims filed within the statute of limitations are reasonably timed does not apply where a plaintiff asks the court to employ tolling doctrines to save claims filed after the limitations period has expired that should have been brought long before. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1991); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 170 (8th Cir. 1995) (en banc), *abrogation on other ground recognized in Madison v. IBP, Inc.*, 330 F.3d 1051, 1056 (8th Cir. 2003).

1 there is no basis for the Court to revisit its prior holding. The Court's September 26, 2013
 2 Order establishes that the DAPs' unreasonable delay has prejudiced the Thomson Defendants;
 3 for the same reasons, the Court should hold that the DAPs' reliance on tolling doctrines is
 4 barred by laches and dismiss their claims with prejudice.

5 There is also no dispute that Thomson SA has been seriously prejudiced by this delay.
 6 Since the DAPs sat on their claims against Thomson SA for a long time – more than four years
 7 – a lower showing of prejudice is required. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695
 8 F.3d 946, 953 (9th Cir. 2012) (noting that “if only a short period of time has elapsed since the
 9 accrual of the claim, the magnitude of the prejudice required before the suit should be barred is
 10 great, whereas if the delay is lengthy, prejudice is more likely to have occurred and less proof of
 11 prejudice will be required.” (citation omitted)). The severe, irremediable prejudice caused to
 12 Thomson SA by the DAPs' delay is clear from the face of their Complaints, the history of this
 13 case, and the Court's September 26, 2013 Order.

14 First, while the DAPs slept on their rights, evidence degraded, memories faded, and
 15 information and personnel involved in Thomson affiliated companies' CRT operations – an
 16 industry which it exited in 2005 – became even more difficult, if not impossible, to locate. *See*
 17 *McCune v. Alioto Fish Co.*, 597 F.2d 1244, 1250 (9th Cir. 1979) (affirming trial court's
 18 dismissal of complaint on basis of laches where plaintiff's three-year delay in bringing claims
 19 made it difficult for defendant to obtain evidence needed to defend claims). Accordingly, it is
 20 difficult for Thomson SA to identify specific evidence needed to defend against the DAPs'
 21 claims that may or may not still exist.

22 The DAPs' argument that Thomson SA has not made a sufficiently “particularized”
 23 showing of evidentiary prejudice rings hollow when their own unreasonable multi-year delay is
 24 what makes it difficult, if not impossible, to identify the witnesses and evidence necessary for it
 25 to adequately defend itself. The DAPs' own allegations establish that Thomson SA exited the
 26 CRT business in 2005 when its CRT-related assets and personnel were transferred to Videocon
 27 Industries in 2005. (Interbond FAC at ¶¶ 22-26.) Had the DAPs timely filed their claims,
 28 Thomson SA may have been able to preserve documents and testimony regarding its former

1 business, but instead the DAPs slept on their rights. By waiting to file claims against Thomson
2 SA until over eight years after it entirely exited the CRT industry, the DAPs have caused
3 Thomson SA severe evidentiary prejudice.

4 The DAPs' delay has also caused Thomson SA expectations-based prejudice. Thomson
5 SA will be forced to bear disproportionate litigation expenses and will be subject to higher
6 potential damages if it is joined to these actions now. Given the size, complexity, and volume
7 of the factual and legal issues raised by this case, bringing Thomson SA into this action now is
8 prejudicial because Thomson SA cannot adequately prepare its defense on the current schedule.
9 And, further delaying the entire CRT case is also unreasonable. The DAPs should not be
10 permitted to benefit from their dilatory conduct by obtaining additional time to litigate their
11 claims against the defendants. Nor should Thomson SA be forced to go it alone on a separate
12 track when it could have meaningfully taken advantage of group litigation efficiencies and
13 reduced the cost of defending this litigation had the DAPs attempted to bring it into this case in
14 a timely manner.

15 The DAPs' unjustified delay has also caused Thomson SA to suffer prejudice through
16 increased exposure to liability for enormous damages. Through no fault of its own and because
17 of the DAPs' delay, settlements with earlier-sued defendants will shift disproportionate and
18 unwarranted risk of liability onto Thomson SA. *See C. Leslie, Judgment-Sharing Agreements*,
19 58 Duke L.J. 747, 758-59 (2009). It would be fundamentally unfair and inequitable to allow the
20 DAPs to benefit from their inexcusable delay by imposing this serious prejudice on Thomson
21 SA.

22 The Court has already found Thomson SA has been prejudiced by the DAPs' delay. By
23 repackaging the same untimely claims in newly-filed complaints, they have not remedied this
24 prejudice. Consistent with its September 26, 2013 Order, the Court should find that the DAPs'
25 reliance on tolling doctrines is barred by laches and dismiss their untimely claims with prejudice.
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28

B. The DAPs' Claims Are Time-Barred and They Have Not Pleaded Specific Facts That Establish a Plausible Basis for Tolling the Statutes of Limitation.

Not only is the DAPs' reliance on tolling doctrines barred by laches, but their claims are barred by the applicable statutes of limitation. "[An antitrust] cause of action begins to accrue and the statute [of limitations] begins to run when a defendant commits an act that injures the plaintiff's business." *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). The statutes of limitation on the DAPs' claims against Thomson SA began to run no later than July 2005, when Thomson SA exited the CRT business. *Smith v. United States*, 133 S. Ct. 714, 719 (2013); *see also Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 839 (11th Cir. 1999), *as modified by* 211 F.3d 1224 (11th Cir. 2000) (holding that the statute of limitations on antitrust claims began to run when defendant sold business and thereby withdrew from alleged conspiracy); *In re High Fructose Corn Syrup Antitrust Litig.*, 293 F. Supp. 2d 854 (C.D. Ill. 2003) (holding that an executive withdrew from an alleged price-fixing conspiracy by resigning). The DAPs' allegations that Thomson SA was a minority shareholder in Videocon until 2007 do not make it plausible to infer that Thomson SA participated in the conspiracy after it exited the CRT industry in July 2005, so the statutes of limitation began to run, at the latest, at that time.

1. Just Months Before the Close of Discovery, the DAPs Do Not Plead Facts That Plausibly Support Fraudulent Concealment.

The DAPs' attempt to plead that Thomson SA fraudulently concealed its alleged participation in the conspiracy does not meet the heightened pleading standards of Fed. R. Civ. P. 9(b). In an effort to gloss over the inadequacy of their allegations, the DAPs cite to a Report and Recommendation ("R&R") filed by former Special Master Legge in February 2010 in which he found that at that early stage in the case, detailed allegations of fraudulent concealment were not necessary. (Opp'n. at 15.) Now, over four years later and after extensive discovery has been conducted, that decision is inapplicable. (*See* [Dkt. No. 1960] at 5-6.) Moreover, the DAPs ignore that, in its Order evaluating that R&R, the Court stated that it was "concerned about the temporal scope of the alleged conspiracies in this case" and suggested that

1 whether Plaintiffs' claims were barred by the applicable statutes of limitation should be more
2 carefully analyzed after discovery had been conducted. *In re Cathode Ray Tube (CRT)*
3 *Antitrust Litig.*, 738 F. Supp. 2d 1011, 1025 (N.D. Cal. 2010).

4 At this stage in the proceedings, the DAPs must plead with particularity specific, dated
5 acts of alleged concealment. *See In re Urethane Antitrust Litig.*, 663 F. Supp. 2d 1067, 1078-9
6 (D. Kan. 2009) (granting motion to dismiss and limiting time periods for which plaintiffs could
7 rely on theory of fraudulent concealment to only those periods corresponding with dated acts of
8 concealment pleaded with particularity in antitrust complaint). They should also be required to
9 plead specific acts of diligence that they undertook to uncover their claims. *In re Processed*
10 *Egg Prods. Antitrust Litig.*, 2013 U.S. Dist. LEXIS 119936 (E.D. Pa. Aug. 23, 2013). Although
11 they have had access to extensive discovery from other alleged conspirators for years, the DAPs
12 do not plead facts with particularity that satisfy these standards so their claims must be
13 dismissed.

14 The DAPs argue that because they have made conclusory allegations of acts of
15 fraudulent concealment by other defendants, the Court may not find that Thomson SA withdrew
16 from the alleged conspiracy when it exited the CRT industry in 2005. According to the DAPs,
17 these allegations make Thomson SA liable for unspecified acts of concealment allegedly
18 committed by other defendants after 2005. The DAPs' theory is not supported by the facts or
19 the law. In cases where the courts have held that fraudulent concealment could apply to toll the
20 statute of limitations even after the defendant had exited the relevant business, plaintiffs had
21 plead specific facts establishing that the withdrawing defendant actively participated in
22 fraudulent concealment before it withdrew. *See In re Rubber Chemicals Antitrust Litig.*, 504 F.
23 Supp. 2d 777, 790 (N.D. Cal. 2007). Moreover, unlike the DAPs here, in these cases, the
24 plaintiffs were not attempting to rely on fraudulent concealment to toll the statutes of limitation
25 during time periods for which they had failed to plead acts of concealment by *any* defendant
26 with the particularity required by Rule 9(b). (*See Interbond FAC at ¶¶ 217-231* (pleading no
27 acts of alleged "concealment" that occurred after November 2004).) Thus, even if other
28 defendants' acts could be imputed to Thomson SA after it exited the CRT industry in 2005, the

1 DAPs have alleged no actions after 2005 that could be so imputed to toll the statutes of
2 limitation during the relevant time period here.

3 **2. American Pipe Tolling Does Not Save the DAPs' Claims.**

4 *American Pipe* tolling does not save the DAPs' claims against Thomson SA. In their
5 Opposition, the DAPs concede that *American Pipe* tolling only applied to toll the limitations
6 period on their claims against Thomson SA from January 2008 until March 2009, when
7 Thomson SA was dropped as a party from the class actions. (Opp'n. at 17-18.) Accordingly, the
8 limitations period began to run again on March 16, 2009 and expired well before November and
9 December 2013, when the DAPs filed their "new" Complaints. Moreover, *American Pipe*
10 tolling does not toll the statutes of limitation that apply to the DAPs' state law claims because
11 the class action complaints only asserted federal claims. Accordingly, for the reasons explained
12 in and based on the authority cited in Thomson Consumer's Motion to Dismiss the DAP
13 Complaints, all of the DAPs' state law claims are untimely and subject to dismissal with
14 prejudice. (See Thomson Consumer's Mot. at 15-16, incorporated by reference and restated as if
15 set forth fully herein.)

16 **3. Government Action Tolling Does Not Apply to the DAPs' Claims.**

17 The Supreme Court has stated that government action tolling serves two purposes: (1) it
18 ensures private litigants "have the benefit of prior Government antitrust enforcement efforts"
19 and (2) it "shorten[s] the period over which treble-damages actions will extend." *Greyhound*
20 *Corp. v. Mt. Hood Stages*, 437 U.S. 322, 334 (1978). Application of the statute here would not
21 serve either of these purposes. Since no meaningful criminal proceedings are currently pending
22 against the fugitive defendants, there is no evidence or other fruit of the government indictments
23 from which the DAPs may benefit. Applying government action tolling here would simply
24 provide a windfall to the DAPs. In addition, contrary to the second purpose of the statute, its
25 application here would result in indefinite tolling, a result that the Supreme Court has rejected.
26 *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) (rejecting
27 interpretation of statute that would permit indefinite tolling, reasoning that "[t]he potential for
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1 such endless tolling in cases in which a reasonably diligent plaintiff would know of the facts
2 underlying the action is out of step with the purpose of limitations periods in general”).

3 Nor is the DAPs’ interpretation of 15 U.S.C. § 16(i) mandated by applicable authority.
4 The DAPs rely on *J.M. Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867 (9th Cir. 2007), for
5 the proposition that a criminal proceeding should always be deemed to have been instituted
6 under the statute after a grand jury returns an indictment. This mischaracterizes *Dungan*. In
7 that case, the court merely rejected the argument that events *before* an indictment – specifically
8 the empanelling of a grand jury – could “institute” criminal proceedings. It did not consider
9 whether an indictment, without more, *always* institutes a criminal proceeding. In fact,
10 consistent with Thomson SA’s arguments, the Ninth Circuit expressly recognized that its
11 holding would “not eliminate all necessity to strike the exquisite balance” in seeking to
12 effectuate the purposes of § 16(i) when determining if government action tolling applies in a
13 particular case. *Id.* at 872.⁴ In accordance with the purposes of the statute, the Court should
14 find that government action tolling does not apply.

15 **C. The DAPs’ Claims Against Thomson SA Should Be Dismissed Because They**
16 **Have Failed to Allege Facts That Plausibly Establish the DAPs Qualify for**
the Ownership or Control Exception to *Illinois Brick*.

17 The DAPs disingenuously suggest that Thomson SA’s arguments that the DAPs have
18 failed to plead facts establishing that they qualify for the ownership or control exception to
19 *Illinois Brick* should be rejected because “this Court has already ruled that the DAPs’ have
20 standing to proceed with their federal claims under” this exception. (Oppn. at 24 (citing [Dkt.
21 No. 1856 at 5]).) In fact, on the same page of the Order cited by the DAPs, the Court expressly
22 stated that it was “mak[ing] no ruling on the adequacy of the DAPs’ allegations of ownership or
23 control.” ([Dkt. No. 1856 at 5].) Therefore, Thomson SA’s arguments that the DAPs have
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26 ⁴ The DAPs’ argument that whether government action tolling applies “does not depend on the
27 success of the government’s case” is a red-herring because Thomson SA has never contended
28 otherwise. (Opp’n. at 20.) Government action tolling does not apply here because no
meaningful criminal proceedings have been instituted from which the DAPs could benefit, not
because the indictments might not yield convictions.

1 failed to adequately plead facts that make it plausible that they possess standing under a
2 recognized exception to *Illinois Brick* are properly before the Court.

3 The Court has recently recognized that “[s]o many years after this MDL’s inception,
4 Plaintiffs should be able to provide something more than boilerplate allegations.” ([Dkt. No.
5 1960] at 5-6.) While, before discovery began, the Court may have determined that the DAPs’
6 generalized allegations were sufficient to state viable claims, now, after years of discovery, the
7 DAPs must plead more detailed facts to make their claims plausible on their face. *Id.*; *see also*
8 *Kendall v. VISA U.S.A., Inc.*, 518 F.3d 1042, 1047-50 (9th Cir. 2008).

9 The DAPs have not plead *any* facts that would allow the Court to plausibly infer that the
10 entities that sold CRT Products to the DAPs were owned or controlled by a DAP, the
11 defendants, or other named co-conspirators. The DAPs do not dispute this, arguing instead that
12 they do not have to. This is not the law. Under Ninth Circuit precedent, the DAPs must plead
13 specific facts that make it plausible that they qualify for the ownership or control exception. *See*
14 *Kendall*, 518 F.3d at 1050. Moreover, just months before the close of discovery, the DAPs
15 cannot credibly claim that they have not had the opportunity to discover the facts needed to
16 make plausible allegations that they qualify for the ownership or control exception. At this late
17 stage in the litigation, the DAPs’ complete failure to plead any facts that would allow the Court
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1 to plausibly infer that the DAPs can satisfy the ownership or control exception mandates
2 dismissal of their claims.⁵

3 CONCLUSION

4 The DAPs' newly-filed complaints are simply an attempted end-run around the Court's
5 September 26, 2013 Order denying them leave to drag Thomson SA into this litigation over six
6 years after it began. The DAPs have failed to make a prima facie case that Thomson SA is
7 subject to the jurisdiction of this Court. In addition, the DAPs' claims against Thomson SA are
8 barred by laches and the statutes of limitation. For the foregoing reasons, Thomson SA
9 respectfully requests that DAPs' claims against it be dismissed with prejudice.

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20 ⁵ The DAPs' reliance on decisions from the *TFT-LCD Antitrust Litig.* for the broad proposition
21 that plaintiffs generally need not plead evidentiary facts establishing the ownership and control
22 exception to *Illinois Brick* is also incorrect. First, *In re TFT-LCD (Flat Panel) Antitrust Litig.*
23 (*Best Buy*), No. 07-1827, 2013 WL 254873, at *3-4 (N.D. Cal. Jan. 23, 2013), is inapposite
24 because the plaintiff *did* identify the seller of LCD products, which was a sister entity to the
25 manufacturer, and the issue was whether the *initial* seller of the fixed-price goods must own or
26 control the direct purchaser. And, Judge Illston's other rulings, when read together, simply
27 suggest that the level of pleading detail necessary to allege the ownership and control exception
28 depends on the circumstances of the alleged conspiracy and the litigation. Compare *In re TFT-*
LCD (Flat Panel) Antitrust Litig. (Viewsonic), No. 07-1827, 2012 WL 5949585, at *3 (N.D.
Cal. Nov. 28, 2012) (holding that specific allegations of the seller of finished LCD products was
unnecessary in light of "significant evidence of the alleged conspiracy in the public record")
with *In re TFT-LCD (Flat Panel) Antitrust Litig. (Proview)*, No. 07-1827, 2013 WL 1164897, at
*3 (N.D. Cal. Mar. 20, 2013) (holding that even where the plaintiff identified the seller,
conclusory allegations of control were insufficient to establish antitrust standing).

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Respectfully submitted,

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